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Supreme Court, U.S.
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No. 92-890

In The

Supreme Court of the United States

October Term, 1992

LESLIE GUINN,

Petitioner,

v.

TEXAS CHRISTIAN UNIVERSITY, THE HARRIS COLLEGE OF NURSING, WILLIAM E. TUCKER, WILLIAM H. KOEHLER, PATRICIA SCEARSE, CAROLYN SPENCE CAGLE, and CAROL A. STEPHENSON,

Respondents.

Petition For A Writ Of Certiorari To The Supreme Court Of The State of Texas

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Petitioner claims the following issue should be considered by the Supreme Court.

> Weather [sic] a [sic] Individual posses [sic] a justiciable cause of action to sue or Counter-sue a University, it's [sic] faculty and staff for negligence resulting in the systematic discrimination, harassment, abuse and mistreatment of some students due to Respondents' gross departure from established professional practices, sexual bias, and the failure to use even ordinary care and caution with students under their care resulting in injury, and damage to those students.

It is the Respondents' position that this question of negligence is not one that merits review by the Supreme Court of the United States.

LIST OF PARTIES

1. The Petitioner herein, Leslie Guinn.
2. The Respondent herein, Texas Christian University.
3. The Respondent herein, The Harris College of Nursing.
4. The Respondent herein, William E. Tucker.
5. The Respondent herein, William H. Koehler.
6. The Respondent herein, Patricia Scearse.
7. The Respondent herein, Carolyn Spence Cagle.
8. The Respondent herein, Carol A. Stephenson.

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RESPONDENTS' BRIEF IN OPPOSITION

OPINIONS BELOW

The opinion and order of the Court of Appeals, Second Appellate District of Texas in Fort Worth, Texas dated November 13, 1991 are produced at Appendices C and D in Petitioner's Petition for Writ of Certiorari. The opinion can also be found at 818 S.W.2d 931 (Tex. App. – Fort Worth, *writ denied*). The denial of Petitioner's Application for Writ of Error on May 20, 1992 and the overruling of Petitioner's Motion for Rehearing on June 17, 1992

by the Supreme Court of Texas are reproduced at Appendices A and B in Petitioner's Petition for Writ of Certiorari.

JURISDICTION

Petitioner's filing of his petition on November 23, 1992 is jurisdictionally out of time, and the Clerk should have refused to receive it. Supreme Court Rule 13.3. The Supreme Court of the State of Texas overruled Petitioner's last motion for rehearing on June 17, 1992. Petitioner's Petition for Writ of Certiorari was not even mailed for filing in "proper" form until November 20, 1992. Although Petitioner attempted to file a petition on September 17, 1992, that petition failed to comply with numerous provisions of the Court's rules. Although Supreme Court Rule 33.7 does allow for the untimely filing of non-complying documents, it requires that "new and proper copies are *promptly substituted.*" Emphasis added.

Petitioner's substitution of "proper" copies was certainly not prompt in that it was in excess of sixty (60) days after the petition was actually due and originally submitted for filing. Supreme Court Rule 13.2 only allows "for good cause shown" an extension of time to file a petition "not exceeding 60 days." In this matter, Petitioner neither sought an extension of time pursuant to Supreme Court Rules 13.6 and 30.3, nor showed any basis for not promptly substituting new and proper copies. Since the Petitioner has not adhered to either Rule 13 or Rule 33, this Court should either refuse to accept for

filing Petitioner's jurisdictionally out of time Petition for Writ of Certiorari or dismiss Petitioner's action.

Furthermore, Petitioner's action does not bring into question any statute, state or federal, which is repugnant to the Constitution or laws of the United States. Nor does Petitioner's pleadings below bring into question any violation by Respondents of the Constitution or any federal statute, treaty or law. Such issues are necessary for this Court to maintain jurisdiction over this attempted review of a state court's actions pursuant to 28 U.S.C. § 1257. As stated in the state court's opinion, Petitioner's pleadings raise only tort issues (Petitioner's Appendix D). Nowhere can Petitioner cite to any allegation of sex discrimination in his pleadings before the state court. In fact, not even in Petitioner's own Statement of Case, does he demonstrate or even state any wrongful acts of Respondents due to sex discrimination under Title IX, 20 U.S.C. § 1681.

Finally, even a cursory review of the issues and questions urged in the Petition for Certiorari by Petitioner show no basis for this Court to exercise its discretion to review this matter. There exists no special or important reasons to grant this petition. All the courts below have followed this Court's prior opinions where applicable, and the case of *Franklin v. Gwinnett County Public Schools*, ___ U.S. ___, 112 S.Ct. 1311, 117 L.Ed.2d 532 (1992), solely relied upon by Petitioner as a basis for this Court's review, is totally inapplicable in both fact and legal precedent to this case.

STATEMENT OF CASE

This is an appeal from the trial courts granting of a summary judgment against Petitioner. Petitioner, a former student at Texas Christian University ("TCU"), sued for money damages alleging certain negligent acts and omissions by Respondents (TCU, the Harris College of Nursing, and some of its professors, administrators and even the Chancellor) in failing to give him a passing grade and in their supervision of his academic activities. The opinion of the state court of appeals (Petitioner's Appendix D-2 through 7) correctly states the nature and results of Petitioner's suit. The following particular facts may be useful in the Court's consideration on whether to deny this petition.

Petitioner initially enrolled as a student at TCU in the spring and summer semesters of 1983 (Petitioner's Appendix D-3). Petitioner dropped out of TCU after those two terms with a 0.5 grade point average and enrolled in the nursing school at the University of Texas at Arlington (*Id.*). After being declared ineligible at that school, he again inquired about readmission to TCU in the spring of 1985 (*Id.*). In January 1986, Petitioner again enrolled for the spring semester without disclosing his problems at University of Texas at Arlington or his prior course of study at TCU.

Petitioner's semester grade point average for the spring of 1986 was 2.545; however, his cumulative grade point average was only 1.823. Although ineligible to enroll in upper division nursing courses because his grade point average did not exceed the required 2.0 minimum, Respondents mistakenly allowed Petitioner to

enroll in upper division nursing courses for the fall 1986 semester, unaware of his 1983 TCU courses (*Id.* at 3-4). Petitioner's progress in these upper level courses was again unsatisfactory, and he was so notified and asked to take corrective measures (*Id.* at 4). Petitioner ultimately received a failing grade in the course despite these warnings (*Id.*).

At the conclusion of the fall semester of 1986, Petitioner's cumulative grade point average at TCU decreased below the minimum required to continue in the nursing program (*Id.*). As a special accommodation, however, Petitioner was approved for conditional registration in nursing courses for the spring 1987 semester pending the outcome of an appeal of his failing grade (*Id.*). Although Petitioner had indicated his desire to continue his progression through the nursing program pending the outcome of the appeal, he never again enrolled in courses at TCU (*Id.* at 5).

During these discussions, Petitioner was advised of the appeal process but failed to comply with the procedures throughout the process (*Id.* at 5). After being notified of the hearing on Petitioner's appeal of his failing grades, he neither appeared at the hearing nor presented any written documents for the committee's consideration (*Id.* at 5-6). Petitioner's failing grade was not changed.

On or about November 11, 1988, unrelated to any of the complaints or appeals urged by Petitioner, Texas Christian University sued to recover sums due and owing the school on an account for credit extended to Petitioner. Petitioner answered the lawsuit and filed a counterclaim

alleging various acts of negligence unrelated to the debt (*Id.* at 6-7). On that same day, Petitioner filed a separate lawsuit alleging the same negligence claims asserted in his counterclaim (*Id.*).

The suits were consolidated, and ultimately a summary judgment in favor of Respondents was entered that Petitioner take nothing by his suit as alleged in his pleadings. Petitioner raised three points of error in the state court of appeals, none of which dealt with or even asserted sex discrimination under 20 U.S.C. § 1681. The court of appeals, affirmed the trial court and issued an opinion on November 13, 1991 (Petitioner's Appendix D).

For the first time before the Supreme Court of Texas, Petitioner asserted that the acts of Respondents were discriminatory under Title IX, 20 U.S.C. § 1681. Petitioner's application for writ of error to the state supreme court merely injected the term "discrimination" along with its other tortious terms without presenting any new or different facts or showing that he was prevented from raising claims for sex discrimination below.

REASONS FOR DENYING THE WRIT

1. PETITIONER'S CLAIMS ARE OF NEGLIGENCE NOT DISCRIMINATION.

As pointed out in the opinion of the court of appeals (Petitioner's Appendix D), all of Petitioner's complaints, as set forth in his final pleadings before the trial court, sounded only in the tort of negligence. In his Petition for Writ of Certiorari and for the first time before the

Supreme Court of Texas, Petitioner wrongfully characterized this case as one based on sex discrimination, particularly Title IX, 20 U.S.C. § 1681. Any indication that Petitioner's lawsuit ever involved discrimination is misleading, if not a direct misstatement. Petitioner's suit is simply a tort action and does not present any basis for this Court's consideration, much less granting the Petition for Writ of Certiorari.

All of Petitioner's pleadings and affidavits sound in tort or negligence complaining generally about the educational system at TCU or of its faculty. These pleadings fail to even mention sex or race discrimination as a basis for damages. The facts even as pleaded and argued by Petitioner simply indicate a complaint about his negligent treatment as a student, not sex discrimination.

The Petitioner's pleadings included no allegations of discrimination of any form, even though prior to the filing of this suit, Petitioner had filed two complaints with the United States Department of Education, alleging the college had discriminated against him on the basis of his race and sex (Petitioner's Appendix D-6). After conducting thorough on-site investigations into Petitioner's complaints each time, the Department found no evidence to support the allegations and determined that TCU was in compliance with all applicable federal laws (*Id.*) No further action was taken by Petitioner on these complaints after his claims were found not to be supported. The lawsuit filed in response to TCU's attempts to collect its debt never referenced any prior complaints, much less described any discrimination based on sex or race.

As stated by the court of appeals, Petitioner's labyrinth of pleadings and summary judgment evidence can be summarized into three general categories of complaints: (1) Respondents' alleged negligent acts or omissions in counseling, teaching and evaluating Petitioner in regard to his nursing courses at TCU; (2) Respondents' alleged negligent acts or omissions in reviewing and failing to remedy Petitioner's failing grade, and his treatment received in his class; and (3) Respondents' failure to assist Petitioner in his timely completion of his nursing degree (Petitioner's Appendix D-11). Therefore, all of Petitioner's allegations require judicial review of the educational process and the exercise of professional judgment at TCU, instead of any complaint about discrimination. Thus no important question for this Court exists, much less a statutory basis for this Court to exercise its jurisdiction to review the issue of Respondents' negligence, if any.

2. NO JUSTICIABLE CAUSE OF ACTION.

The real question at issue in this case deals with the intrusion into the academic affairs of educators by the judiciary. This does not present a novel or important question for this Court's consideration. In fact, this Court has lead the way in refusing to intrude upon the educational process and professional judgment of educators in matters of academic performance, educational policy and decision-making and, therefore, have declined to hold a school liable for such educational malpractice. Annot., 33 A.L.R. 4th 1166, 1167 (1984); Annot., 1 A.L.R. 4th 1139, 1140 (1980). Neither a court nor a jury are in a position to

substitute its judgment for that of a professor or faculty committee which is:

> uniquely positioned to observe [the student's] judgment, self-discipline, and ability to handle stress and was thus specially well-suited to make the necessarily subjective judgment of [the student's] prospects for success. . . .

Regents of the University of Michigan v. Ewing, 474 U.S. 214, 106 S.Ct. 507, 88 L.Ed.2d 523 (1985).

School authorities have the *absolute discretion* and courts should not meddle in a university's student evaluation procedures and decision-making. *Board of Curators of University of Missouri v. Horowitz*, 435 U.S. 78, 92, 98 S.Ct. 948, 956, 55 L.Ed. 124, 136 (1978).

> In matters of scholarship, the school authorities are uniquely qualified by training and experience to judge the qualifications of a student, and efficiency of instruction depends in no small degree on the school faculty's freedom from interference from other noneducational tribunals.

Connelly v. University of Vermont and State Agricultural College, 244 F. Supp. 156, 160 (D. Vt. 1965). The question of whether a student should or should not receive a passing grade is a matter left wholly within the discretion of the professor and the university "who alone are qualified to make such a determination." *Id.* at 161. "Courts are particularly ill-equipped to evaluate academic performance." *Board of Curators of the University of Missouri v. Horowitz*, 435 U.S. 78, 92, 98 S.Ct. 948, 55 L.Ed.2d 124, 136 (1978). Academic evaluations of a student do not lend themselves to judicial review, and the determination

of whether to dismiss a student from a program for academic reasons "requires an expert evaluation of cumulative information" that is, by its very nature, somewhat subjective. *Id.* 435 U.S. at 90, 55 L.Ed.2d at 135. This function is by tradition and reason left to school officials to whose judgment a reviewing court is to accord great deference. *Id.*

This policy of judicial restraint also applies in a university's placement, educational and policy decisions such as placement of a student in special programs. *See* Annot., 33 A.L.R. 4th 1166, 1168 (1984); *see also, Tubell v. Dade County Public Schools*, 419 So.2d 388 (Fla. App. D3 1982), *Hoffman v. Board of Education*, 49 N.Y.2d 121, 424 N.Y.S.2d 376, 400 N.E.2d 317 (1979). Public policy considerations concerning the propriety and efficacy of judicial review of the educational system precludes a finding of liability or *even the recognition of a cause of action*. Annot., 33 A.L.R. 4th 1166, 1168 (1984), *see also, Smith v. Alameda County Social Services Agency*, 90 Cal. App. 3d 929, 153 Cal. Rptr. 712 (1st Dist. 1979). *Donohue v. Copiague Union Free School District*, 47 N.Y.2d 440, 414 N.Y.S.2d 375, 391 N.E.2d 1352 (1979).

Under the precedent established by the U.S. Supreme Court in *Board of Curators of the University of Missouri v. Horowitz* and *Regents of the University of Michigan v. Ewing*, Respondents established as a matter of law before the trial court that professional judgment was being exercised and, therefore, no genuine issues of material fact existed for a trier of fact to resolve. The conduct of Respondents pleaded by Petitioner, including assigning him a grade of "F," was based on professional judgment related solely to Petitioner's academic performance and

nothing else. The Texas courts properly applied the precedent which holds that such claims simply do not state a cause of action established by the Supreme Court and recognized in Texas. There simply is no basis to urge before this Court that sex discrimination was ever a part of this lawsuit. All of the courts below considered these matters and acted in accord with this Court's opinions in granting judgment for the Respondents.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari filed by Petitioner LESLIE GUINN should be denied.

Respectfully submitted,

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